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No. 85-1129

In The
Supreme Court of the United States
October Term, 1985

PAUL E. JOHNSON,
Petitioner,

v.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY, CALIFORNIA, and SERVICE EMPLOYEE INTERATIONAL UNION LOCAL 715,
Respondents.

PETITIONER'S REPLY

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PAUL JOHNSON WAS THE BEST QUALIFIED CANDIDATE, BUT HE LOST HIS PROMOTION SOLELY ON ACCOUNT OF HIS SEX.

This Reply Brief is tendered for one reason: to insure that the facts of this case remain as clear in the briefs as they appear in the record.[1] Respondents attempt to justify their treatment of Paul Johnson by arguing that the candidates were equally qualified and thus, the sex of the candidates could be considered as an additional factor. Then, the Respondent attempts to show that the second oral board was prejudiced against women, or at least Diane Joyce. Finally, Respondent seems to argue that the case is moot, although the issue is never clearly identified. None of these arguments find any support in the record.

Respondents[2] assert that Johnson and Joyce were equally qualified and therefore, it was permissible to use sex as "an additional positive factor" in the decision to promote Joyce to the position of Road Dispatcher. [Resp. at 7.] The record does not support this construction.

The qualifications of Johnson and Joyce were not equal. Paul Johnson was twice selected as the better qualified candidate when compared to Diane Joyce. [Pet. App. 18-19a.] Moreover, the second oral board unanimously selected Johnson as the *best* qualified candidate. RT. 159 (Testimony of James Baldanzi), RT. 166 (Testimony of Clyde Davis). The trial court, after hearing the evidence and judging the credibility of the witnesses, determined

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[1]Petitioner stands on the legal discussion of a conflict among the circuits, as described in the Petition for Certiorari, pp. 7-10.

[2]The Brief in Opposition to the Petition for Certiorari, filed by the Santa Clara County Transportation Agency, is herein referred to as Resp.

that Paul Johnson was the best qualified as a matter of fact and law. [Pet. App. 12a (Findings of Fact, ¶ 18, Conclusions of Law, ¶ 3).]

Having ignored the record, Respondents intimate that Johnson's selection was the result of "chauvinistic" attitudes toward Diane Joyce, rather than an objective decision based on Johnson's superior qualifications. [Resp. at 2, n.1.] Respondent's interpretation is unsupported in the record, as well as being legally irrelevant. The issue here is not whether the oral board discriminated against Diane Joyce on the basis of her sex, by recommending Paul Johnson for promotion. The issue is whether the County of Santa Clara discriminated against Paul Johnson, by promoting Diane Joyce solely on account of her sex.

Even if Respondent's argument concerning sex bias were relevant, it is clear that the examination process was fair to all. Two of the three men who served on the second oral interview board were called to testify before the district court. James Baldanzi admitted that he viewed Diane Joyce as a "rebel-rouser" due to her union activities—not her sex. RT. 153. He also testified under examination by counsel for the County that he kept his personal view out of the interview and selection process. *Id.* Indeed, the Respondent failed to show any sex bias on the part of any member of the oral board, as demonstrated by the testimony of Clyde Davis.

> [MR. WOODSIDE]: YOU DID KNOW MOST OF THE CANDIDATES BEFORE THE INTERVIEW PROCESS, CORRECT?
>
> [MR. DAVIS]: YES, I KNEW ALL OF THEM.
>
> [MR. WOODSIDE]: YOU KNEW THEM ALL? DID YOU HAVE ANY PRECONCEIVED NOTIONS AS TO DIANE JOYCE'S SUITABILITY FOR THE JOB OF ROAD DISPATCHER?

[MR. DAVIS]: I DID NOT.

[MR. WOODSIDE]: DID YOU HAVE ANY—YOU INDICATED IN RESPONSE TO QUESTIONS AS TO HER GENDER THAT HER GENDER WAS APPARENT. CAN YOU EXPLAIN THAT?

[MR. DAVIS]: YES. SHE'S A FEMALE.

[MR. WOODSIDE]: WAS IT APPARENT—WAS THAT, IN ANY WAY, UNUSUAL, OR DID THAT STRIKE YOU AS BEING A FACTOR IN YOUR DECISIONMAKING?

[MR. DAVIS]: NOT IN THE LEAST.

[MR. WOODSIDE]: WHAT ABOUT HER UNION ACTIVITY?

[MR. DAVIS]: THAT AFFECTED ME NOT IN THE LEAST.

RT. 172-173. The trial court found as a matter of fact that the selection process was fair in all respects. [Pet. App. 12a (Findings of Fact, ¶ 18).] The appellate court agreed. [Pet. App. 20a.]

Respondents finally argue that there is no longer an injury to Paul Johnson because both he and Diane Joyce have been promoted.[3] [Resp. at 6, n.4.] Paul Johnson's promotion and recent retirement do not end the matter, however. His retirement benefits, through the public Employment Retirement System, are based upon his salary during the last three years of his employment with the County. If the decision of the Ninth Circuit stands, then the County may have to reclassify his benefits to reflect a lower grade.

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[3]Mr. Johnson was promoted pursuant to district court's decision.

CONCLUSION

Paul Johnson's situation is not atypical or unique. This Court should act to clarify the law of affirmative action, to insure that no person suffers the discriminatory treatment that Paul Johnson received, in the name of affirmative action. Moreover, there is a clear conflict among the Circuits which can only be resolved with this Court's guidance. For these reasons the Supreme Court should grant this Petition for a Writ of Certiorari.

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